

No. 15741

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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IRWIN ARAN d/b/a AUTO NURSE MANUFACTURING COM-  
PANY,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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On Appeal From the United States District Court for the  
Southern District of California, Central Division.

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## OPENING BRIEF OF APPELLANT.

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## OPENING BRIEF OF APPELLANT.

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This action arose in the United States District Court for the Southern District of California under the jurisdiction granted by Title 28, United States Code, Section 1346(a)1.

### Jurisdiction.

Appellant sought a refund of Manufacturers Excise Taxes erroneously paid. Matter was heard and testimony and documents were introduced in evidence. On April 9, 1957, the Court made an order for findings of fact, conclusions of law and judgment for the respondent and on

May 17, 1957, judgment was entered for respondent, in the docket. This order and judgment are final and appealable.

Jurisdiction is conferred upon this Court by Title 28, United States Code, Section 1291. Appellant filed his Notice of Appeal on July 1, 1957.

### **Issues Presented.**

(1) WHETHER THE LOWER COURT ERRED IN DETERMINING THAT BABY BOTTLE WARMERS AS MANUFACTURED AND SOLD BY APPELLANT ARE AUTOMOBILE PARTS OR ACCESSORIES WITHIN THE LANGUAGE OF SECTION 3403(c) OF THE 1939 INTERNAL REVENUE CODE AND ITS PRESENT COUNTERPART SECTION 4061(b) OF 1954 INTERNAL REVENUE CODE?

(2) WHETHER TREASURY REGULATION 46,316.55(c) AS AMENDED T. D. 5099 1941-2 CUM. BULL. 267 IS AN UNREASONABLE INTERPRETATION OF THE STATUTE UPON WHICH IT IS BASED, AND AS SUCH INAPPLICABLE TO IMPOSE A TAX UPON BABY BOTTLE WARMERS, USABLE IN AUTOMOBILES?

(3) WHETHER THE COURT ERRED IN USING THE PRIMARY ADAPTABILITY TEST IN DETERMINING WHETHER BABY BOTTLE WARMERS ARE AUTOMOBILE PARTS OR ACCESSORIES AS INCLUDED WITHIN THE LANGUAGE OF SECTION 3403(c) OF THE 1939 INTERNAL REVENUE CODE NOW SECTION 4061(b) OF THE 1954 INTERNAL REVENUE CODE?

(4) WHETHER THE COURT ERRED IN FINDING THAT APPELLANTS BABY BOTTLE WARMERS ARE NOT EQUALLY ADAPTABLE TO OTHER USES AND HENCE NOT SUBJECT TO TAX UNDER SECTION 3403(c) OF THE 1939 INTERNAL REVENUE CODE NOW 4061(b) OF THE 1954 INTERNAL REVENUE CODE?

(5) WHETHER THE JUDGMENT IS CONTRARY, IN PART, TO THE LAW AND EVIDENCE?

### Statement of Facts.

Appellant is the manufacturer of baby bottle warmers fitted with a cord and plug connection which may be inserted into the cigarette lighter socket found in automobiles and motor vehicles equipped with such lighters.

These baby bottle warmers are, among other things, designed to warm a baby's bottle in an automobile. The Treasury Department had for many years taxed appellant's baby bottle warmers as an automobile part or accessory under Section 3403(c) of the 1939 Internal Revenue Code and a Treasury regulation commonly referred to as T. R. 46.316.55(c) as Amended T. D. 5099, 1941-2 Cum. Bull. 267.

The Treasury Department is now taxing appellant's baby bottle warmers under Section 4061(b) of the 1954 Internal Revenue Code which is the present counterpart of Section 3403(c).

Neither of these sections expressly or impliedly include baby bottle warmers as parts or accessories of automobiles, but the Treasury regulation aforesaid makes any item primarily adaptable for use in an automobile. Taxable as an automobile part or accessory, whether essential to the operation thereof or not.

Appellant during the period of May 31, 1949, through November 17, 1954, paid to the respondent the sum of \$8,208.62 as payments of manufacturers' excise tax under Section 3403(c) of the 1939 Internal Revenue Code, now Section 4061(b) of the 1954 Internal Revenue Code.

On February 4, 1955, the following letter from R. J. Bopp, Chief Excise Tax Branch, Commissioner of Internal Revenue, Washington, D. C., was sent to appellant:

“AUTO NURSE MANUFACTURING COMPANY  
41 Market Street  
Venice, California

Attention: Mr. Irwin Aran

Gentlemen:

In your letters dated November 27 and December 29, 1954, you request a ruling as to whether a baby bottle warmer of your manufacture is subject to manufacturers' excise tax.

You state that your baby bottle warmer plugs into the cigarette lighter of an automobile and heats the baby bottle.

The baby bottle warmer described is not considered to be an automobile part or accessory and, therefore, is not subject to manufacturers' excise tax.

Very truly yours,

R. J. Bopp

CHIEF, EXCISE TAX BRANCH”

On February 14, 1955, appellant filed his claim for refund with the District Director of Internal Revenue in Los Angeles, California, and on May 4, 1956, appellant's claim for refund was disallowed, and on August 8, 1956, his appeal therefrom was rejected by Treasury Department, Appellate Division.

After taxpayer, appellant, had filed his claim for refund the Internal Revenue Service by letter dated December 8, 1955, notified appellant that it was reversing its prior decision of February 4, 1955. Appellant's baby bottle

warmers had not changed in use, or in any manner or capacity whatsoever during this time. Nor had the law in any way been altered, broadened, or made to include baby bottle warmers.

Subsequently appellant filed his complaint for refund in the United States District Court for the Southern District of California, Central Division. The Court in its Amended Findings of Fact and Conclusions of Law found that the sum of money which was paid by appellant during the four years immediately preceding the filing of the claim for refund on February 14, 1955, was \$6,877.99 and that if appellant would be entitled to a refund it would be in that amount since appellant had not passed the tax on to the ultimate consumer but had absorbed same in his cost and profit structure.

The Court further found that these baby bottle warmers were primarily adapted for use in connection with taxable vehicles and as such were subject to manufacturers excise tax as an automobile part or accessory, even though they were primarily used by parents with infant children and are primarily sold in baby, drug and department stores and have nothing to do with the operation, utility, or ornamentation of the automobile and are not useful to automobiles or motorists as a class. It is in part from these findings and conclusions that appellant appeals this matter.

### Specification of Errors.

The Court Erred in Finding That Baby Bottle Warmers as Sold and Manufactured by Appellant Are Automobile Parts or Accessories Within the Language of Section 3403(c) of the 1939 Internal Revenue Code Under Which They Were Originally Taxed, and Sec. 4061(b) of 1954 I. R. C. Under Which They Are Now Taxed.

(1) The language of Section 3403(c) of the 1939 Internal Revenue Code clearly states what shall be considered parts or accessories for automobiles, whether or not primarily adapted for such use. In this connection that section provides:

“ . . . FOR THE PURPOSE OF THIS SUBSECTION AND SUBSECTIONS A AND B, SPARK PLUGS, STORAGE BATTERIES, LEAF SPRINGS, COILS, TIMERS AND TIRE CHAINS, WHICH ARE SUITABLE FOR USE ON OR IN CONNECTION WITH, OR AS COMPONENT PARTS OF ANY OF THE ARTICLES ENUMERATED IN SUBSECTIONS (A) AND (B) SHALL BE CONSIDERED PARTS OR ACCESSORIES FOR SUCH ARTICLES, WHETHER OR NOT PRIMARILY ADAPTED FOR SUCH USE. THIS SUBSECTION SHALL NOT APPLY TO CHASSIS OR BODIES FOR AUTOMOBILE TRUCKS OR OTHER AUTOMOBILES. . . .”

(Emphasis ours.)

Nothing therein contained provides for the taxation of baby bottle warmers as parts or accessories nor for any construction that *any* item primarily adapted for use in an automobile whether essential to its operation, utility or ornamentation or not shall be considered as an auto part or accessory.

**The Judgment Is in Part Contrary to the Law and the Evidence.**

(1) The lower court has misinterpreted the legislative intent as set forth in Section 3403(c) of the 1939 Internal Revenue Code, The legislature referred only to specific items which would be considered parts or accessories whether or not primarily adapted for use on *automobile chassis or bodies*, as provided in Subsections (A) and (B).

(2) The evidence clearly manifested that appellant's baby bottle warmers have no connection with the chassis or body of the automobile.

(3) The Treasury regulation commonly referred to as T. R. 46.316.55(c) as amended T. D. 5099, 1941-2 Cum. Bull. 267 has attempted to extend beyond the clear import of the language used in 3403(c) of the 1939 Internal Revenue Code the effect of the statute levying the tax, and a judgment for respondent here ratifies the language of that Treasury regulation.

(4) The legislature intended the tax to extend to the framework or body of the automobile and to parts or accessories connected with the performance, or ornamentation or utility thereof and not to baby bottle warmers which may be used in an automobile.

**The Court Erred in Finding That Appellants Baby Bottle Warmers Were Not Equally Well Adapted to Other Uses and as Such Not Taxable as Auto Parts or Accessories.**

(1) Evidence established that appellants baby bottle warmers had other uses which according to the law would avoid tax against such items as auto parts or accessories.

**The Lower Court Erred by Improperly Applying the Primary Adaptability Test to Determine Whether Baby Bottle Warmers Are Auto Parts or Accessories, and in So Finding.**

(1) The lower court improperly applied a primary adaptability test to determine whether baby bottle warmers are auto parts or accessories by not considering whether baby bottle warmers are essential to the operation, use or ornamentation of motor vehicles and in failing to consider that their use is limited to parents with infant children only.

**Summary of Argument.**

Appellant's baby bottle warmers are primarily used by parents with infant children and are found in baby, drug and department stores. They carry the Parents Magazine Seal of Approval and are not sold with, on or in connection with automobile chassis or bodies.

They are a convenience to parents with infant children and in no manner aid in the performance, ornamentation or utility of the automobile itself.

The statute under which they have been taxed and the new statute under which they are now being taxed, are not as broad as the Treasury Department would interpret them to be, nor was it intended by the legislature in the passage of these statutes for the tax to be assessed as it has been done to date by the Treasury Department.

The Treasury Regulation 46.316.55(c) as amended, T. D. 5099, 1941-2 Cum. Bull. 267, which apparently

attempts to embody Section 3403(c) goes far beyond the language of the statute which assesses the tax and as such should not be considered in determining whether baby bottle warmers are automobile parts or accessories. *In fact the Treasury Department chooses to disregard the fact that Congress did not see fit to impose tax on all articles used by persons while driving or riding in an automobile, and the lower court by its judgment erroneously has approved the language contained in that Treasury regulation which seeks to do so.* The mere fact that baby bottle warmers may be used more often in an automobile than elsewhere does not make them automobile parts or accessories. They in no way enhance the performance, utility or ornamentation of automobiles and as such the true intent of the legislature would hold these baby bottle warmers free from a manufacturers' excise tax as automobile parts or accessories. Further, motorists or automobiles as a group or class are in no way benefited by baby bottle warmers.

## ARGUMENT.

**Whether the Lower Court Erred in Determining That Baby Bottle Warmers as Manufactured and Sold by Appellant Are Automobile Parts or Accessories Within the Language of Section 3403(c) of the 1939 Internal Revenue Code and Its Present Counterpart.**

Baby bottle warmers attached with a cord and plug for insertion into those automobiles containing a cigarette lighter socket are not automobile parts or accessories but baby parts or accessories.

They are designed for the convenience and luxury of modern day living to the end that they aid the bedraggled parents in maintaining their infant children while being able to move from one place to another, if desired.

The bottle warmer is not attached to the automobile, DOES NOT AID IN THE MOVE! It merely aids the parent in keeping the infant complacent during the move. It does not seem logical nor plausible that the legislature could possibly have intended to tax as automobile parts or accessories every item which may be used by persons while driving or riding in an automobile.

If that were the case the logical rationale would require the taxation as automobile parts or accessories to include such articles as, gloves, first aid kits, baby cribs, safety flares, prosthetic devices for disabled drivers, and similar articles primarily sold for use by motorists although wholly unrelated to the appearance, performance or utility of the automobile itself. *Baby bottle warmers are accessories to living, not automobiles.*

Automobile parts or accessories are found primarily in automobile stores; appellant's baby bottle warmers are sold, as manifested by the evidence, primarily in gift

stores, baby stores, department stores and drug stores. Certainly this is not indicative of an automobile part or accessory. How many automobile parts are used as baby shower gifts or found in baby stores? How many automobile parts are advertised in Parents Magazine or have received Parents Magazine seal of approval?

The language of Section 3403 and specifically Subsection (c) of that section invites the Court's investigation. (See App., *infra*.) In that section the legislature has said, among other things, that spark plugs, storage batteries, leaf springs, coils, timers and tire chains, which are suitable for use on or in connection with, or as component parts of any of the articles enumerated in Subsections (a) and (b) shall be considered parts or accessories for such articles, whether or not primarily adapted for such use.

The legislature did not speak in terms of baby bottle warmers which might be used in automobiles and did not speak in terms of applying this section to every item which might be used in an automobile. The legislature further did not speak in terms of every item whether or not primarily adapted for such use. The use of the language *whether or not primarily adapted for such use* when examined in its context clearly manifests only an intention to tax as parts or accessories, whether primarily adapted for use thereon, or not, the articles enumerated in that section. It is not so broad as to include articles which may be used in automobiles but which have nothing to do with the performance, utility or ornamentation of the automobile. (I. R. C., 1939, Sec. 3403(c) *infra*; I. R. C., 1954, Sec. 4061(b).)

It would have been a simple thing for the legislature to have included such a meaning if they had intended to do

so in the first instance, or at any time thereafter. But having failed to do so, it is submitted that to tax as in this instance, baby bottle warmers as auto parts or accessories, is inconsistent with the intent set forth in the taxing statute and inconsistent with the language and effect thereof.

**It Is Apparent That What the Legislature Had in Mind at the Time of the Passing of Section 3403(c) of the 1939 Internal Revenue Code Was a Tax on Items Which Were Primarily Connected With the Intimate Operation, Function, Utility and Ornamentation of the Motor Vehicle.**

The generic meaning of part or accessory clearly manifests that appellant's baby bottle warmers cannot be included.

*Smith v. McDonald*, 214 F. 2d 920.

If baby bottle warmers were parts or accessories, would it not necessarily follow that upon the sale of such vehicle to which they constituted a part or accessory thereof, that they would necessarily be sold along with the vehicle? Does one generally sell his vehicle without all of its parts or accessories?

**Whether or Not Baby Bottle Warmers Are Automobile Parts or Accessories Under the Language of the Statute in Point Depends Upon a Reasonable Construction of the Statute in Question.**

*The mere fact that any item may be used in an automobile and used there more often than other places is not decisive to classify the article as an auto part or accessory under the statute involved herein.*

*McCaughn v. Electric Storage Battery Co.*, 63 F. 2d 715.

**The Automobile Must Be Primarily Adapted to the Baby Bottle Warmer Before It May Even Be Used in an Automobile.**

The baby bottle warmer is not primarily adapted for use in a motor vehicle. The auto must be adapted to the baby bottle warmer before it may even be used as a warmer in an auto. If the vehicle is not equipped with a cigarette lighter socket (which is not uncommon) the baby bottle warmers are not usable in an auto or motor vehicle. They are not of general use to motorists and are not primarily adapted to an automobile. If the auto or motor vehicle is not adapted to the warmer there can be no connection with the automobile in any respect, except perhaps in one of the other usages which these baby bottle warmers may be placed. (*Cuno Eng. Corp. v. United States*, 43 F. 2d 259 at 262 (Ct. Cl. 1930).) Therefore it would seem that the language of the statute did not contemplate all products which were primarily or remotely adapted to motor vehicles and in that connection to their intimate operation, use, utility or ornamentation.

In *Smith v. McDonald*, a Third Circuit case decided in 1954, 214 F. 2d 920, the Court had a similar situation before it. That case involved signs designed primarily to be adapted and attached to taxicabs or automobiles. (All taxable vehicles under Sections 3403(c) and 4061(b) as presently interpreted.) These signs were attached to the roofs of these automobiles and apparently operated from the electrical system of the automobile itself. The lower court in 116 Fed. Supp. 158 held that this item was primarily designed and adapted for use on or in connection with automobiles under Section 3403(c) whether it aided functionally the automobile or not. On appeal the learned

Appellate Court stated that each case must rest upon its own facts and it is not merely a part or accessory because it was primarily used in connection with an automobile. The Court reasoned that these signs were accessories to the automobile operators' business and NOT the motor vehicle. Further the Court went on to say that the motor vehicle was in no way aided in its performance, utility or did it function in a better manner. And the court held that the statute was not so broad as to tax every item which might be used by motorists, while operating or using the motor vehicle, thereby reversing the lower court.

By analogy appellant's baby bottle warmers fall within the same category. They are an aid to the parents with infant children. They are accessories to the parent with such children. Furthermore, the *McDonald* case involved an item which could be used on any automobile, whereas appellant's baby bottle warmers can only be used as a warmer in those motor vehicles equipped with cigarette lighter sockets. The Treasury regulation involved in the *McDonald* case contains the same language as the one now before this court, and even in the face of its broad language making any item primarily adapted for use in an automobile whether essential to its operation or not the appellate court reversed the trial court.

It is therefore urged of this Honorable Court that the lower court be reversed and a finding be made that appellant's baby bottle warmers are not parts or accessories of motor vehicles taxable under Sections 3403(c) or 4061(b) of the 1939 and 1954 Internal Revenue Codes, respectively.

Whether Treasury Regulation 46.316.55(c), as Amended, T. D. 5099, 1941-2 Cum. Bull. 267, Is an Unreasonable Interpretation of the Statute Upon Which It Is Based and as Such Inapplicable to Impose a Tax Upon Baby Bottle Warmers Usable in Automobiles.

Any regulation adopted by the Commissioner or Treasury Department *must* bear a reasonable relationship to the statute itself and not to a construction placed thereon by said department.

*Smith v. McDonald*, 214 F. 2d 920;

*Gould v. Gould*, 245 U. S. 151, 61 L. Ed. 211;

*United States v. Merriam*, 263 U. S. 179, 68 L. Ed. 240.

T. R. 46.316.55(c) as amended T. D. 5099, 1941-2 Cum. Bull. 267, bears no reasonable relationship to the statute upon which it is based, namely 3403(c) of the 1939 I. R. C. now 4061(b) of the 1954 I. R. C. The treasury department themselves are apparently confused as to the law and interpretation to be placed on both the statute and their regulation.

This is clearly shown by the letter written to appellant on February 4, 1955 (*supra*) wherein they advise appellant that his baby bottle warmers are not considered by them as auto parts or accessories under the statutes and regulation involved herein. Neither the statutes nor regulation had changed in effect at any time during this taxing period yet approximately 10 months later, and after appellant had made his application for refund the treasury department reversed its February 4, ruling.

This it is conceded is most unusual. Neither the law nor the bottle warmer had changed in any substantial

manner. The same treasury regulation was before the department when it made its ruling on February 4, 1955, and the baby bottle warmers were then adapted for the same uses as thereafter. It can only be said in passing that the Treasury Departments application of this Treasury Regulation is as confusing as the actual basis for the passage of such a regulation in the first instance.

The statute upon which it is allegedly based, certainly does not permit the levying of this tax upon articles primarily adapted for use in motor vehicles, whether essential to their operation or not. Case law on the other hand strongly reveals the incorrectness of such a regulation and correctly indicates that there must be some connection with the function, utility or ornamentation of the item involved before it might be considered a part or accessory. (*Smith v. McDonald*, 214 F. 2d 920; *Johnie & Mack, Inc. v. United States*, 123 Fed. Supp. 400.)

In *Cuno Eng. Corp. v. United States*, 43 F. 2d 259-252, the appellate court in a most similar situation as the one presently at bar, decided that electric cigar and cigarette lighters usable in automobiles were not subject to the excise tax in question as a part or accessory. The treasury regulation then provided that any article which was primarily adapted for use in connection with an auto, whether essential to its use or not was such an item as to be considered as a part or accessory for purposes of the tax.

The court said that the product did not prolong the life of the car nor aid in the operation thereof and that even though the treasury regulation had construed the applicability of such statute to exist against products whether essential to the autos use or not, that in the case of cigarette lighters for autos they were merely for the convenience of smokers or for their luxury and this did in no way add

to the utility of the car or prolong its operation or life.

The court said that the taxing statute could not be construed by the court like the regulation would have it. They went on to say that obviously a clear distinction prevails as was within the intent of the Revenue Act between an extraneous article or devise capable and designed to be used as an item of luxury and comfort of the occupant and to items intimately connected with the autos safe operation, function, utility or ornamentation.

Even though cigarette lighters may today be a taxable item as an auto part or accessory the reasoning of this decision stands on its own two feet in both a logical and reasonable interpretation of both the statute and regulation.

Appellants baby bottle warmers are designed for the convenience and luxury of parents with infant children, and in no way prolong the life of the vehicle or add in any manner to its operation, function, utility or ornamentation. By utility is meant function, by ornamentation is meant beauty.

The Treasury Department has held that emblems designed only to be attached to automobiles to show membership in auto clubs and societies are not taxable. (S. T. 409, II-1 C. B. 285.) How can this be reconciled wherein they are primarily adapted for use on the auto though not essential to the operation thereof? There are too many inconsistencies in the attitude of the Treasury Department and it is incumbent upon this court to clearly show the way and properly interpret Section 3403(c) of the 1939 I. R. C. and its present counterpart Section 4061(b) of the 1954 I. R. C.

Under a revenue ruling grease kits sold separately, even though primarily adapted for use on rear axles of automobiles are not taxed as parts or accessories of automobiles. (53 Rev. Ruling, 166.) Tire pressure gauges are not subject to tax on auto parts even though principally used by service stations and garages and primarily adapted for use on automobile tires. (Rev. Ruling, 55-304.) All of these rulings clearly manifest a complete lack of understanding of the true intent of the legislature in connection with what is to be taxed and what is not to be taxed as auto parts or accessories under Section 3403(c) of the 1939 I. R. C. and 4061(b) of the 1954 I. R. C.

It is submitted therefore that baby bottle warmers were not contemplated by the legislature to be included within the language of 3403(c) or its present day counterpart and as such the lower court erred in its finding that appellants baby bottle were auto parts or accessories.

**Whether the Court Erred in Using the Primary Adaptability Test in Determining Whether Baby Bottle Warmers Are Automobile Parts or Accessories as Included Within the Language of Section 3403(c) of the 1939 I. R. C. Now Section 4061(b) of the 1954 I. R. C.?**

Primary adaptability means that the product is itself intimately connected with the function, operation, utility, or ornamentation of the motor vehicle. It goes no further than this. (*Smith v. McDonald*, 214 F. 2d 920; *Cuno Eng. Corp. v. United States*, *supra*.)

The court in applying the primary adaptability test in this matter failed to take into consideration whether or not baby bottle warmers aid in the performance, utility or ornamentation but apparently rendered its decision based

upon the fact that appellants baby bottle warmers are used in automobiles and other motor vehicles more often than other places and ignored the fact that the baby bottle warmer has limited use, only to parents with infants, and not useful to auto owners as a class. However, the law is clear in this regard. Even the intention of the manufacturer has nothing to do with the actual utility of the article for determining whether it is subject to the tax or not. (*American Chain Co. v. Hartford Conn. Trust Co.*, 11 Fed. Supp. 770.) The fact that automobiles are the place where appellants baby bottle warmers are used more often than elsewhere in *not decisive* to classify said items as auto parts or accessories under the code, nor to classify them as primarily adapted for use in automobiles. (*McCaughn v. Electric Storage Battery Co.*, 63 F. 2d 715.)

The statute itself is the only measure to be used in determining what are or are not parts or accessories for automobiles or motor vehicles. Certainly the legislature did not intend to tax as auto parts or accessories any item which might be used in the auto and primarily adapted for use in the auto though not essential to its operation. The primary adaptability is a test which the courts seem to have evolved as the criterion for determination or classification of the item or product involved. The courts themselves have in effect adopted a test which the statute does not provide, but case decision may permit taxation in this record if the product in some reasonable manner aids in the operation, function or ornamentation of the vehicle. The only basis therefore to determine what shall be considered as a part or accessory must be a reasonable and logical examination of the item involved, examined in the light of human knowledge, reason and understanding.

Under a revenue ruling grease kits sold separately, even though primarily adapted for use on rear axles of automobiles are not taxed as parts or accessories of automobiles. (53 Rev. Ruling, 166.) Tire pressure gauges are not subject to tax on auto parts even though principally used by service stations and garages and primarily adapted for use on automobile tires. (Rev. Ruling, 55-304.) All of these rulings clearly manifest a complete lack of understanding of the true intent of the legislature in connection with what is to be taxed and what is not to be taxed as auto parts or accessories under Section 3403(c) of the 1939 I. R. C. and 4061(b) of the 1954 I. R. C.

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The court in applying the primary adaptability test in this matter failed to take into consideration whether or not baby bottle warmers aid in the performance, utility or ornamentation but apparently rendered its decision based

upon the fact that appellants baby bottle warmers are used in automobiles and other motor vehicles more often than other places and ignored the fact that the baby bottle warmer has limited use, only to parents with infants, and not useful to auto owners as a class. However, the law is clear in this regard. Even the intention of the manufacturer has nothing to do with the actual utility of the article for determining whether it is subject to the tax or not. (*American Chain Co. v. Hartford Conn. Trust Co.*, 11 Fed. Supp. 770.) The fact that automobiles are the place where appellants baby bottle warmers are used more often than elsewhere in *not decisive* to classify said items as auto parts or accessories under the code, nor to classify them as primarily adapted for use in automobiles. (*McCaughn v. Electric Storage Battery Co.*, 63 F. 2d 715.)

The statute itself is the only measure to be used in determining what are or are not parts or accessories for automobiles or motor vehicles. Certainly the legislature did not intend to tax as auto parts or accessories any item which might be used in the auto and primarily adapted for use in the auto though not essential to its operation. The primary adaptability is a test which the courts seem to have evolved as the criterion for determination or classification of the item or product involved. The courts themselves have in effect adopted a test which the statute does not provide, but case decision may permit taxation in this record if the product in some reasonable manner aids in the operation, function or ornamentation of the vehicle. The only basis therefore to determine what shall be considered as a part or accessory must be a reasonable and logical examination of the item involved, examined in the light of human knowledge, reason and understanding.

Appellants baby bottle warmers examined in this light has limited use and can only be classified as baby accessories designed for the convenience of parents with infant children, and certainly not auto parts or accessories.

**Whether the Court Erred in Finding That Appellants Baby Bottle Warmers Are Not Equally Adaptable to Other Uses and Hence Not Subject to Tax Under Section (c) of the 1939 I. R. C. and Section 4061(b) of the 1954 I. R. C.**

An article even though designed primarily for use in an auto but being equally adaptable for other uses, is not taxable as an auto part or accessory. (*McCaughn v. Electric Storage Battery Co.*, *supra*.)

In the latter case storage batteries were used primarily in cars and prior to the amendment of the statute they were held not to be parts or accessories due to their other equally adaptable uses.

What are the uses of appellants baby bottle warmers?

The evidence revealed that they may be used as baby gifts; to insulate and retain temperature for periods of time without any connection to the automobile; to act as a holder of the baby's bottle before use as a warmer, or after warmed. Certainly these baby bottle warmers are equally adapted to each such use. Again the manufacturers intent has no bearing whatsoever on this point. (*American Chain* case, *supra*.) Being equally adaptable to other uses they cannot be taxed as in the case at bar, as automobile parts or accessories.

### Conclusion.

Since the baby bottle warmers in question are primarily designed for use by parents with infant children and are not items which are generally used by motorists as a class it would seem *ergo* that the Internal Revenue Department in applying Section 3403(c) has failed to understand the legislative intent thereof and has adopted a Treasury Regulation with an unrealistic attitude and an attempt to encompass a field in which it should have no control according to legislative intent.

It is submitted to this Honorable Court that unconstitutional practices get their start in small ways and then continue on. It appears that the Internal Revenue Service intended, unjustifiably, that a snowball be formed, and that it be extended into an encroachment upon any product which might in some manner be used on or in motor vehicles. Disregarding logic and understanding the Internal Revenue Department in this field is attempting to avail itself of the fruits of its acts in order to accomplish complete control over commerce, business and private enterprise.

**In a Government of Laws, Existence of the Government Will Be Imperiled If It, Its Agents and Employees Fail to Observe the Law Scrupulously.**

*The Treasury Department in its zeal has usurped the function of the legislature* and it is submitted therefore that the lower court in accepting the Treasury Department's interpretation, regulation and explanation of Section 3403(c) of the 1939 I. R. C. and its present counterpart has erred, and such error should be reversed by this Honorable Court.

The record, the law and the evidence in this case at bar fails to reveal any grounds upon which baby bottle warmers may properly be taxed as an auto part or accessory and as such it is respectfully urged that the judgment of the lower court be in part reversed and judgment be rendered in favor of appellant for refund in the sum of \$6,877.99.

Respectfully submitted,

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## APPENDIX A.

Section 3403, 1939 Internal Revenue Code:

Sec. 3403, as amended: There shall be imposed upon the following articles sold by the manufacturer, producer or importer a tax equivalent to the following percentages of the price for which so sold:

(A) Automobile Truck Chassis, Automobile truck bodies, Automobile bus chassis, automobile bus bodies, truck and bus trailer and semitrailer chassis, truck and bus trailer and semitrailer bodies, tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer (Including in each of the above cases parts or accessories therefore sold on or in connection therewith or with the sale thereof, 8% except that on and after April 1, 1955 the rate shall be 5%.) A sale of an automobile truck, bus or truck or bus trailer or semitrailer shall for the purpose of this subsection be considered to be a sale of the chassis and of the body.

(B) Other automobiles chassis and bodies, chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles and motorcycles (including in each case parts or accessories therefore sold on or in connection therewith or with the sale thereof) except tractors, 10% except that on and after April 1, 1955 the rate shall be 7%. A sale of an automobile, trailer, or semitrailer shall, for the purpose of this subsection be considered to be a sale of the chassis and of the body.

(C) Parts or accessories (other than tires and inner tubes and other than radio or television receiving sets) for any of the articles enumerated in subsections (A) or

(B) 8% except that on and after April 1, 1955 the rate shall be 5%. *“For the purpose of this subsection and subsections A and B, spark plugs, storage batteries, leaf springs, coils, timers and Tire chains, which are suitable for use on or in connection with, or as component parts of any of the articles enumerated in subsections (A) and (B) shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. . . .”*